88-1444

Supreme Court, U.S.
FILED
MAR 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

MICHAELA BERESTEANU GOLIN,

Petitioner,

v.

FMC CORPORATION and GEORGE E. MOEHRINGER.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MICHAELA BERESTEANU GOLIN
626 Dutch Neck Road
East Windsor, NJ 08520
Tel. Nr.: (609) 448-6592
Petitioner, pro se

55 pp

QUESTIONS PRESENTED

1. Did the District Court err in holding that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, pre-empts a cause of action in contract and tort against the employer for a retaliatory discharge motivated by resistance to sexual harassment?

2. Did the District Court err in failing to consider evidence that the employer treated the plaintiff less favorably than comparable employees outside her group, and in holding, after a full trial on the merits, that the plaintiff did not establish a *prima facie* case of employment discrimination under Title VII?

3. Did the denial of plaintiff's motion for recusal violate the Due Process Clause of the Fourteenth Amendment, where the record reveals the trial

judge's hostility toward the plaintiff and bias in favor of the defendants?

TABLE OF CONTENTS

Questions Presented i

Table of Contents iii

Table of Authorities v

Opinion Below 1

Jurisdiction 2

Constitutional Provisions and Statutes 2

Statement of the Case 3

Relevant Procedural History . . . 3

Statement of the Facts 7

A. Background 7

B. The Sexual Harassment . . . 14

C. Favorable Treatment of Male Employees and Acquiescent Female Employees 16

D. The Sexual Harassment Complaint 19

E. The Employer's Response . . 23

REASONS FOR GRANTING THE WRIT 26

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT

SHOULD BE SETTLED BY THIS COURT, AS TO WHETHER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PRE-EMPTS A CAUSE OF ACTION IN CONTRACT AND TORT AGAINST THE EMPLOYER FOR AN AT-WILL EMPLOYEE'S DISCHARGE MOTIVATED BY RESISTANCE TO SEXUAL HARASSMENT 26

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AS TO THE PROPER STANDARD OF PROOF IN AN EMPLOYMENT DISCRIMINATION ACTION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 . 32

III. THE DECISION BELOW CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT AS TO A TRIAL JUDGE'S DUTY UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO RECUSE HIMSELF WHEN HE IS PERSONALLY BIASED AND PREJUDICED AGAINST ONE OF THE PARTIES 37

Conclusion 46

TABLE OF AUTHORITIES

Cases: Page

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 28

Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580 (1987) 30

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 34, 35

Glezos v. Amalfi Ristorante Italiano, Inc., 651 F.Supp. 1271 (D Md. 1987) 29

Holien v. Sears, Roebuck and Co., 298 Or. 76, 689 P.2d 1292 (1984) 31

In Re Murchison, 349 U.S. 133 (1955) 38

Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951) 43

Knapp v. Kinsey, 232 F.2d 458 (CA6), certiorari denied, 352 U.S. 892 (1956) 39, 43

Lucas v. Brown & Root, Inc., 736 F.2d 1202 (CA8 1984) 28

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) 34, 35

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 35

Cases: Page

Offutt v. United States,
348 U.S. 11 (1954) 42

Salazar v. Furr's, Inc.,
629 F.Supp. 1403 (D NM 1986) . . 29

Savage v. Holiday Inn Corp. Inc.,
603 F.Supp. 311 (D Nev. 1985) . . 29

Taylor v. Hayes, 418 U.S. 488
(1974) 39, 42

Teamsters v. United States,
431 U.S. 324 (1977) 34

U.S. Postal Service Board of Governors v.
Aikens, 460 U.S. 711 (1983) . . 34-37

Ungar v. Sarafite, 376 U.S. 575
(1964) 42

United Mine Workers of America v. Gibbs,
383 U.S. 715 (1966) 4, 27

Statutes, Rules and Regulations:

28 U.S.C. § 144 37

28 U.S.C. § 455 37

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1343 3

Due Process Clause of the Fourteenth
Amendment of the United States
Constitution . . . i, 2, 37, 38, 42

Page:

Fed.R.Civ.P. 41(b) 5, 33

New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. 2, 3, 5, 26, 27

Rule 1:8-4, Current New Jersey Court Rules 42

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. . . . . i, 2, 3, 5, 26-32

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

MICHAELA BERESTEANU GOLIN,

Petitioner,

v.

FMC CORPORATION and GEORGE E. MOEHRINGER.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The petitioner, Michaela Beresteanu Golin, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 7, 1988.

OPINION BELOW

The Court of Appeals affirmed without opinion the judgment rendered by the District Court for the District of

New Jersey. The opinion of the District Court is reproduced in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on November 7, 1988. A timely petition for rehearing was denied on December 2, 1988, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

This action involves Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12 *et seq.*; and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, the pertinent text of which is set out in the appendix

to this petition.

STATEMENT OF THE CASE

Relevant Procedural History

This is an individual action alleging sexual harassment, retaliation, and various torts by a private employer and one of its supervisory employees. This action was brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., ("Title VII"); its state equivalent, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12 et seq., ("NJLAD"); assault, battery, malicious interference with employment, breach of contract and tortious discharge. (Appendix ["App."] 2a-3a).

The District Court had jurisdiction over the federal claims under Sec. 706 of Title VII, 42 U.S.C. § 2000e-5, and 28 U.S.C. § 1343. The doctrine of pendent jurisdiction was

invoked for the state claims, assault, battery, malicious interference with employment, breach of contract and wrongful discharge, arising out of essentially the same factual allegations. United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966).

On January 13, 1987, prior to the presentation of evidence in this case, the plaintiff moved for recusal under 28 U.S.C. §§ 144, 455(a) and 455(b)(1), alleging that the trial judge had a personal bias and prejudice against her and in favor of the defendants. The judge denied plaintiff's motion, and refused to disqualify himself from the case. (Transcript of Hearing on Plaintiff's Motion for Recusal, 1/16/87 and 1/30/87).

Opening statements to the jury were presented on January 30, 1987. On

February 10, 1987, the district judge on his own motion dismissed plaintiff's breach of contract and wrongful discharge claims against the corporate defendant on the ground that these claims are pre-empted by Title VII and its state equivalent. (Transcript of Hearing on Motions In Limine, 1/27/87, pp. 47-50; Trial Transcript, Volume 8, page 5 ["8T5"]; Appendix to this Petition ["App."], p. 8a).

At the end of plaintiff's presentation of evidence, the defendants moved for involuntary dismissal under Fed.R.Civ.P. 41(b), for failure to establish a prima facie claim of employment discrimination. (7T3). The defendants' motion was denied on February 10, 1987, (8T5), and the case proceeded to a full trial on the merits.

On February 18, 1987, the jury found for the individual defendant on the claims of assault, battery, and malicious interference with employment. (12T37).

On August 26, 1987, the District Court filed the Opinion containing its Findings of Fact and Conclusions of Law on plaintiff's sexual harassment and retaliation Title VII claims, (App. 1a-67a), and entered judgment for the defendants on all claims. (App. 68a-69a).

On January 13, 1988, the plaintiff filed a timely notice of appeal to the United States Court of Appeals for the Third Circuit, seeking review of the District Court's judgment in this case.

On November 7, 1988, the Court of Appeals summarily affirmed the judgment of the District Court. (App. 70a-71a). Plaintiff's timely petition for rehearing was denied on December 2, 1988.

(App. 72a-73a).

Statement of the Facts

A. Background

Petitioner, plaintiff below, received a PhD in theoretical nuclear physics from Rutgers University in 1975. Throughout her educational years, plaintiff was consistently at or near the top of her class. (District Court Opinion, Findings of Fact ["Findings"] #2, App. 12a).

Respondent FMC Corporation is a multinational business corporation (3T228) engaged, inter alia, in the manufacture of chemicals. (3T256, 3T259). At all times relevant to this lawsuit, from November 1979 until April 1981, plaintiff was employed by FMC at its Princeton, New Jersey, Research and Development Center as a Senior Programmer/Analyst. (Findings #1, App. 11a). Except for a period be-

tween July 1980 and October 1980 when she was temporarily transferred to another group, plaintiff was assigned to work in the Technical Computing Services group ("TCS"), under the direct supervision of defendant George E. Moehringer. (Findings #1, App. 12a). Moehringer holds a Master's degree in engineering and in business administration. (8T131, 8T138).

The TCS group was managed by Dr. John Erjavec. In addition to TCS, Erjavec managed three other groups: Automation and Instrumentation Services ("A&IS"), Process Analysis and Statistical Analysis. (Findings #3, App. 14a-15a). Erjavec was ultimately responsible for all the hiring and discipline decisions, while defendant Moehringer recommended and participated in the hiring, firing, training, promotion, and discipline of his subordinates. (Id.). From

1968 to 1979, Moehringer supervised approximately 20 employees at FMC. (Id.).

In late February 1980, Golin complained to Erjavec, in Moehringer's presence, about her supervisor's habit of "walking into her" and of standing close to her when discussing work assignments. (Findings #6, App. 17a). Subsequently, in late February or early March of 1980, Moehringer complained to Erjavec about the plaintiff's job performance. (Id.).

The plaintiff testified that in late April 1980, she had to give a presentation in Middleport, New York. She testified that Moehringer insisted that she leave Princeton the night before, with him and one other employee, and that she spend the night in a hotel provided by FMC. (Findings #7, App. 18a; 5T160-161). Golin further testified that Moehringer became very angry when she

decided to go to Middleport on the morning of the presentation rather than travel with him the night before. (Id.). Plaintiff asserts that subsequent to the Middleport incident conflicts with Moehringer became more frequent. (Id.).

In 1981, Golin tape recorded a conversation between herself and Carol C. Scutte, Moehringer's secretary, in which Scutte said that she remembered the Middleport incident and Moehringer's screams. (Plaintiff's Exhibit P-35). Scutte relocated in Florida and did not testify at the trial. The tape recorded conversation was held inadmissible. (3T263, 3T266, 3T280).

Approximately one month after the Middleport incident, in late May or early June 1980, Moehringer complained to Erjavec in writing about the plaintiff's performance, and requested Erjavec to

allow him "to exercise the perrogative [sic] [he had] as the supervisor of a new exempt employee and discharge her from FMC before the problems become more serious." (Findings #8, App. 19a-20a). Erjavec did not approve the recommendation to discharge. (Id.)

In late July 1980, Erjavec arranged for the plaintiff to be transferred temporarily to the A&IS group to work under the direction of David Hall and Mike Zadoff. (Findings #9, App. 20a). Golin worked in this group until October 1980, when she returned to her regular group, and was again under the direct supervision of Moehringer. (Id.).

For her work in the A&IS group, plaintiff received from Hall a performance evaluation of 3, which means "standard performance." (Final Pretrial Stipulation and Order, filed 5/31/84, Section

2, Stipulation of Facts ["Stipulations"] #2.3, #2.4, p. 2A).

About one month after Golin returned to the TCS group, in November 1980, Moehringer provided Erjavec with an 11-page poor performance review of her work. (Findings #10, App. 21a). Erjavec reviewed this performance evaluation with the plaintiff. She disputed most of the comments made by Moehringer, and claimed that he was highly biased against her. (Id.). Specifically, the plaintiff challenged Moehringer's views that she took two to three times longer than a competent programmer would take to complete her projects. (Id., App. 22a).

As a result of his own review, Hall's evaluation and the performance evaluation of Moehringer, Erjavec determined that the plaintiff should be rated a 2, (satisfactory, but requires improve-

ment - some objectives not met), and he recommended her for a 5.8% salary increase. (Findings #12, App. 24a). In the comments section of the performance review, Erjavec wrote: "[a]lthough [Golin] is an experienced scientific Fortran programmer, she had to learn the DEC PDP 11/70 system, the VAX 11/780 system and some new software packages such as DRS. *** Her two main strengths in her performance are her good interaction with users and her good program documentation. Her weaknesses appear to be software development effort taking two to three times that expected by her supervisor, George Moehringer, and software that runs more slowly than anticipated by her supervisor." (Id., App. 24a-25a).

Erjavec testified that he was hoping that the plaintiff's work would improve through counseling and coaching

by Moehringer. (Id., App. 25a). Erjavec advised Golin that she should report to Moehringer in his office to keep him informed of her work and for coaching. (Id., App. 25a-26a).

B. The Sexual Harassment

Golin alleges that, while under the supervision of Moehringer, she was subjected by him to unsolicited sexual advances and remarks. (Findings #19, App. 35a). The events complained of were: Moehringer walking into her each time he came to her office to discuss professional matters, (Id.); Moehringer walking into her and telling her she would be raped if she worked after hours, (Id.; 5T154); Moehringer frequently asking for rides home in the evening, (Id.; 5T155); Moehringer rubbing her face with her coat's lapel, (Id.); Moehringer telling plaintiff he would like to hug her (Id.,

App. 36a); Moehringer becoming angry because she refused to travel with him to Middleport, New York, in the evening before a presentation, (Id.); and Moehringer telling her that a subordinate must do everything to please her boss. (Id.).

Golin acknowledged at trial that she was reluctant to meet with Moehringer in his office to discuss her work because of Moehringer's repeated sexual advances. (Findings #12, App. 26a). Golin and other programmers requested Moehringer to hold group meetings. However, he denied their request. (Id.; 5T191, 2T134-135).

In February 1981, plaintiff attempted to attend a Macro/Fortran systems services training course. Moehringer denied his permision for Golin's attendance. (Findings #14, App. 24a-25a). In a

memorandum he wrote to Erjavec regarding his denial of authorization, Moehringer wrote "The cost of one week of training for Golin is larger that $2500. I don't think she is worth the investment. *** I don't think she will ever be a good programmer." (Defendant's Exhibit JD-27, in evidence at 2T50).

C. Favorable Treatment of Male Employees and Acquiescent Female Employees

Moehringer authorized one of his female subordinates, Gail Carol Wright, to attend the Macro course, as well as a variety of other training courses. (3T83). Wright testified that, during a birthday party held for her by her coworkers at FMC, Moehringer kissed her on the cheek, and that she was not offended by his kiss. (Findings #26, App. 46a). Wright also testified that she traveled with Moehringer on business

trips, that they spent a week in the same hotel, and that Moehringer stood closer than a normal person would when he spoke to her, but none of these facts concerned her. (Id., App. 47a). Moehringer thought that Wright was a satisfactory employee (9T53), even though she sometimes missed project deadlines. (3T78).

Jeanne Root, another female employee supervised by Moehringer, testified that Moehringer stood so close to her when discussing her work assignments that she felt uncomfortable. (Findings #26, App. 47a; 2T130-131). Root alleges that she never complained about this conduct, because Moehringer "was the boss". (2T132). Moehringer admittedly was satisfied with Root's performance and advanced her in grade to Senior Programmer/Analyst, (9T52), even though he never cared to estimate how long Root's proj-

ects should take, (3T117, 3T118-120), but simply told Root to "make it work". (3T121).

Hall's projects were delayed by a month, or two, or three, sometimes they were not completed, and were abandoned. (6T261). The same applies to Mike Zadoff's projects. (Id.). Despite these performance failures, in or about October 1980, Erjavec promoted Hall to the supervisory level. (6T278).

Golin worked very long hours at FMC, remaining at work sometimes until 10:00 p.m. and even until 1:00 a.m. (5T180). Disregarding this fact, Moehringer reprimanded Golin for not arriving at work promptly at 8:00 a.m. (Plaintiff's Exhibit P-20, in evidence at 5T197). Yet Moehringer admittedly understood and it seemed all right to him that Robert Kiessling, a male subordinate,

always began work one hour late, at 9:00 a.m. (8T94).

Moehringer alleges that the company had a very definite policy that the working hours for all employees at the Research Center were 8:00 a.m. to 4:30 p.m. (8T142). This testimony was contradicted by David Hall, who also reported to Erjavec at the Princeton Research Center. Hall testified that he had quite a bit of variability in the times he came in, and was never required to arrive at FMC at certain hours or leave at certain hours. (6T258).

D. The Sexual Harassment Complaint

On February 20, 1981, at a meeting between Golin and Erjavec regarding the denial of Golin's training request, (5T192), Erjavec told Golin that Moehringer was very unhappy about her performance. (Findings #15, App. 29a).

Erjavec believed that Golin was lacking in a couple of important areas which could have been improved if she interacted more with Moehringer and sought his advice, but because she didn't do this, Erjavec alleges that he felt that the situation was hopeless. (Id.). Erjavec suggested that Golin might look for another job, but, at the same time, he vigorously reassured Golin: "I told her that we were not planning on firing her." (6T152, 6T199).

At that time, Golin requested and was granted a two-week vacation to begin immediately. (Findings #15, App. 29a). The plaintiff was on vacation from February 23, 1981 until March 9, 1981. (Id., App. 30a). Plaintiff testified that during the week of February 23, she returned to FMC and spoke to Burton Friedman, Personnel Supervisor, regarding the

denial of her training request. (Id.). She testified without contradiction that she confided in Friedman her belief that Moehringer denied her request because she rejected his sexual advances. (Id.).

On March 9, 1981, when plaintiff returned from vacation, Moehringer reprimanded her for failing to adhere to the "regular" working hours. (Findings #18, App. 32a). He warned Golin that, as of March 11, her pay would be reduced for not reporting to work on time. (Id.).

Moehringer also reprimanded Golin for failing to report to his office as she had been directed. (Findings #18, App. 34a). Plaintiff told Moehringer that she was reluctant to go to his office because he made passes at her. (Id.).

The same day, plaintiff went to the Personnel Department, and reported to Ed Politi, Employment Supervisor, that

she was reluctant to go to Moehringer's office as requested because Moehringer had been making passes at her. (Id., App. 35a; Stipulations #2.12, p. 2B; 5T199).

Two days later, on March 11, 1981, the plaintiff received a two-page memorandum from Moehringer in which he informed her that she would be discharged. (Findings #20, App. 38a). In support of this decision, Moehringer alleged Golin's inability to complete assignments on time, the poor quality of her work and her lack of cooperation. (Id.).

On March 12, 1981, Golin met with Erjavec and with Maurice Duggan, Personnel Manager, and complained to them about Moehringer's alleged sexual overtures. (Findings #21, App. 38a). Golin also suggested that other female subordinates had experienced similar problems

with Moehringer. (Id.).

E. The Employer's Response

In response to plaintiff's sexual harassment complaint, Erjavec suggested to Golin that she must provide the names of other women, in order to prove Moehringer's alleged bias. (Findings #25, App. 43a-44a). In a tape recorded conversation between Golin and Erjavec which took place on March 19, 1981, Golin asked Erjavec about the possibility of transferring to another group. (Findings #28, App. 49a). Erjavec answered that a transfer was not out of the question, but that it would not be necessary if Moehringer was guilty of the conduct charged. (Id.). Erjavec added that, if Moehringer was not found guilty, then, on the basis of Moehringer's evaluation of Golin's work, Golin would be discharged, as he had recommended. (Id.)

One of Golin's coworkers, Barbara A. Dvorak, approached Erjavec, and suggested that she should be interviewed by the FMC investigators because she believed she had a similar experience with Moehringer. (Findings #22, App. 39a). At trial, Erjavec testified that Dvorak reported to him that "George [Moehringer] had made an advance to her which she brushed off, and subsequently, she felt that George was being difficult to live with, you know, criticizing her work and so on." (6T217). Erjavec allegedly told Dvorak that she had misinterpreted Moehringer's conduct, that sexual advances are subject to interpretation, and that these matters are in the eye of the beholder. (6T218, 3T28). The District Court did not permit Dvorak to testify before the jury. (8T53).

On or about March 26, 1981, plaintiff filed a Verified Complaint with the State of New Jersey Department of Law & Safety, Division on Civil Rights, ("NJDCR") alleging sexual harassment by her supervisor. (Stipulations #2.16, p. 2B). On March 30, 1981, Golin notified FMC of the filing of that complaint. (Stipulations #2.17, p. 2B).

Plaintiff's employment with FMC was terminated approximately 10 days later, on April 9, 1981. (Findings #27, App. 47a). Plaintiff was granted two weeks severance pay in lieu of termination notice. (Plaintiff's Exhibit P-13, in evidence 6/26/87).

On April 10, 1981, plaintiff filed with the NJDCR an amended complaint, charging sexual harassment and retaliation. (Findings #29, App. 50a). This complaint was also filed with the

Equal Employment Opportunity Commission. (Id.). The Commission issued a right-to-sue letter on April 20, 1982. (Id.).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, AS TO WHETHER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PRE-EMPTS A CAUSE OF ACTION IN CONTRACT AND TORT AGAINST THE EMPLOYER FOR AN AT-WILL EMPLOYEE'S DISCHARGE MOTIVATED BY RESISTANCE TO SEXUAL HARASSMENT

The petitioner alleges that she was terminated in retaliation for pressing a sexual harassment claim and for filing an employment discrimination charge with the State FEP Agency and the EEOC. (Final Pretrial Stipulation and Order, filed 5/31/84, Section 3.A.4, p. 3).

Petitioner initiated the present action under Title VII and its state

equivalent, and further asserted pendent jurisdiction over the breach of contract, wrongful discharge, and other common law claims arising out of essentially the same allegations of fact. United Mine Workers of America v. Gibbs, 383 U.S. 715, 725-726 (1966).

Prior to trial, the District Court sua sponte dismissed the breach of contract and the wrongful discharge claims against the corporate employer on the ground that these claims are pre-empted by Title VII and its state equivalent. (Transcript of Hearing on Motions In Limine, 1/27/87, pp. 47-50; 8T5; App. 8a). The judge only allowed before the jury the common law claims against the individual defendant. The Court of Appeals affirmed without opinion. (App. 70a-73a).

It is respectfully urged that the decision below is erroneous and at variance with the applicable decisions of the United States Court of Appeals for the Eighth Circuit and the Supreme Court of New Jersey.

In Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-50 & n.9 (1974) this Court has recognized that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., is an independent statutory remedy, not intended to be exclusive, but to supplement other remedies available for unlawful employment practices.

The decision below directly conflicts with the holding of the Court of Appeals for the Eighth Circuit in Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1206-1207 (CA8 1984) that Title VII does not pre-empt an action in contract

and tort against the employer where the discharge is motivated by resistance to sexual harassment on the job. See also, e. g., Savage v. Holiday Inn Corp. Inc., 603 F.Supp. 311, 315 (D Nev. 1985) (Title VII does not bar tort remedies where the discharge is motivated by discriminatory bias against female and older employees). But see Glezos v. Amalfi Ristorante Italiano, Inc., 651 F.Supp. 1271, 1276 (D Md. 1987) (Title VII provides exclusive remedy for constructive discharge motivated by sexual harassment and precludes common law action in tort); Salazar v. Furr's, Inc., 629 F.Supp. 1403, 1409 (D NM 1986) (Title VII preempts tort action for discharge in violation of public policy prohibiting sex discrimination in employment).

Finally, the decision below directly conflicts with the holding of

the New Jersey Supreme Court in Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 536 A.2d 237 (1988) and Giudice v. Drew Chemical Corp., 104 N.J. 465, 517 A.2d 448, 449 (1986), that an at-will employee discharged for pressing an employment discrimination claim or for reporting sexual harassment on the job may maintain a cause of action in contract, or tort, or both against the employer, because such a discharge is in violation of public policy. The Supreme Courts of Arizona and Oregon also have recognized that Title VII does not preclude a common law action in tort for a discharge motivated by resistance to sexual harassment. See Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580, 586 n.1 (1987) (no error in concurrent filing of federal Title VII claim for sexual harassment and tort claim based upon the same facts); Holien

v. Sears, Roebuck and Co., 298 Or. 76, 689 P.2d 1292, 1303-1304 (1984) (Title VII and state equivalent legislation do not negate a common law action in tort for discharge based on sexual harassment on the job).

It is respectfully urged that Title VII is not an exclusive remedy, and that a cause of action in contract and tort is available in New Jersey to an at-will employee discharged for resisting sexual harassment on the job or for pressing an employment discrimination claim.

These related causes of action in contract and tort are particularly important in an employment discrimination case because they provide the parties with the right to a jury trial, which is not available under either Title VII or its state equivalent.

Furthermore, the action in tort permits the recovery of compensatory and punitive damages, while the monetary damages available under Title VII are limited to back pay.

The importance of the issue presented and the conflict with the applicable decisions of the Eighth Circuit and the Supreme Court of New Jersey justify the grant of certiorari to review the judgment below.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AS TO THE PROPER STANDARD OF PROOF IN AN EMPLOYMENT DISCRIMINATION ACTION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

This is an employment discrimination case of disparate treatment type. The petitioner alleges that she was terminated because she rejected her supervisor's sexual advances and filed an employment discrimination charge with the

State FEP Agency and the EEOC. (Final Pretrial Stipulation and Order, filed 5/31/84, Section 3.A.4, p. 3).

At the end of plaintiff's presentation of evidence in the District Court, the defendants moved for involuntary dismissal under Fed.R.Civ.P. 41(b), for lack of a prima facie case. (7T3). The defendants' motion was denied (8T5), and the case proceeded to a full trial on the merits.

Approximately six months after the trial, the District Court entered judgment for the employer on the ground that the plaintiff did not make out a prima facie case of employment discrimination under Title VII. (App. 60a, 62a, 63a). The District Court further held, in substance, that the plaintiff was terminated for "good cause". (App. 59a-60a). The Court of Appeals affirmed with-

out opinion. (App. 70a-73a).

It is respecfully submitted that this decision is erroneous and contrary to the applicable decisions of this Court.

In an employment discrimination case, it does not matter whether the employer had "good cause" to fire an employee. See, e.g., McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 284-285 (1976). Rather, "[t]he central focus of inquiry in a case such as this is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978) (quoting Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)). See also, e.g., U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983);

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

At trial, Golin presented evidence that the employer treated her less favorably than comparable employees outside her group. (See Section C, pp. 16-19, supra).

The District Court failed to give consideration to this comparative evidence, and entered judgment for the employer on the ground that the plaintiff was discharged for "good cause". (App. 59a-60a). This decision is erroneous and contrary to the holdings of this Court in Aikens, Furnco, McDonald and McDonnell Douglas.

Furthermore, the District Court erred in stating, at the end of the entire case, that the plaintiff failed to make out a prima facie case of employment discrimination under Title VII. (App.

60a, 62a, 63a).

This Court has made it clear that in the Title VII context the phrase prima facie case denotes the establishment of a rebuttable presumption that the employer unlawfully discriminated against the plaintiff. Aikens, 460 U.S. at 714. Where, as here, the employer fails to persuade the District Court to dismiss the action for lack of a prima facie case, and proceeds to offer evidence of the allegedly legitimate reason for the plaintiff's rejection, "the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, [and] whether the plaintiff really did so is no longer relevant." Aikens, 460 U.S. at 715 (emphasis added).

Therefore, in the language of Aikens, the District Court below "errone-

ously focused on the question of prima facie case, rather than directly on the question of discrimination." 460 U.S. at 717.

The importance of the issue presented and the conflict with the applicable decisions of this Court justify the grant of certiorari to review the judgment below.

III. THE DECISION BELOW CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT AS TO A TRIAL JUDGE'S DUTY UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO RECUSE HIMSELF WHEN HE IS PERSONALLY BIASED AND PREJUDICED AGAINST ONE OF THE PARTIES

Before the presentation of evidence in the District Court, the plaintiff filed a motion for recusal under 28 U.S.C. §§ 144, 455(a) and 455(b)(1), asserting that the trial judge was biased and prejudiced against her and in favor of the defendants. The judge

denied plaintiff's motion. (Hearing on Plaintiff's Motion for Recusal, 1/16/1987 and 1/30/1987). The Court of Appeals affirmed without opinion. (App. 70a-73a).

It is respectfully submitted that this decision violates the Due Process Clause of the Fourteenth Amendment and is contrary to the decisions of this Court.

A fair trial before an impartial tribunal is a basic requirement of the Due Process Clause of the Fourteenth Amendment. See Mayberry v. Pennsylvania, 400 U.S. 455, 465-466 (1971). This Court has noted that "[f]airness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." In re Murchison, 349 U.S. 133, 136 (1955). See also Taylor v. Hayes, 418 U.S. 488, 501-

503 (1974).

It is beyond dispute that "[w]hen the remarks of the judge during the course of a trial, or his manner of handling the trial, clearly indicate a hostility to one of the parties, *** or an alignment on the part of the Court with one of the parties for the purpose of furthering or supporting the contentions of such party, the judge indicates, whether consciously or not, a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored." Knapp v. Kinsey, 232 F.2d 458, 466 (CA6), certiorari denied, 352 U.S. 892 (1956) (emphasis added).

In the present case, the district judge's personal hostility to the plaintiff and marked bias in favor of the defendants are evident in the record.

As the trial progressed, the judge repeatedly referred to the plaintiff in a demeaning manner, stating that Golin was "spewing" or "vomiting" her citations, (8T26), that she seemed to have a "script", (8T17), that he would control Golin's anticipated "regurgitation" on rebuttal, (7T73), and that Golin was "filibustering". (6T22-24, 6T29, 11T60).

The judge further displayed his animosity toward the plaintiff by repeatedly failing to address her as "Dr." Golin, while gracefully addressing her former FMC manager as "Dr." John Erjavec. (6T14, 6T109, 6T112, 6T119-120, 6T122; Transcript of Hearing on Plaintiff's Application to Take Deposition, 1/7/87, p. 5, p. 15, p. 17, p. 22; Transcript of Hearing on Plaintiff's Motion for Recusal, 1/16/87, p. 8; correspondence from

Hon. G. E. Brown, Jr., to plaintiff, dated 12/19/86, 12/30/86, 9/29/87, 10/8/-87, 1/25/88, 3/23/88, 1/11/89).

The judge granted the defendants a 5-day continuance based on the alleged discomforts of defense counsel's dog, (9T152, 9T159-160), while repeatedly denying Golin's requests for continuance based on her own illness. (3T8-9, 2T178, 2T188).

The judge credited the individual defendant's "testimony" even when there was none. Despite the fact that Moehringer did not refute Dvorak's testimony on sexual harassment, the judge found Moehringer more "credible" than Dvorak on this point. (App. 61a).

The trial judge's bias against the plaintiff and against women, in general, is further demonstrated by his failure to appoint a woman as the fore-

person of the jury in the present case, even though both juror number 1 and juror number 2 were women and Rule 1:8-4 of the New Jersey Court Rules mandated such appointment. (App. 80a).

This Court has recognized that "the inquiry must be not only whether there was actual bias on [the judge]'s part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of [one party] and the interests of the [other].'" Taylor v. Hayes, 418 U.S. 488, 501 (1974) (quoting Ungar v. Sarafite, 376 U.S. 575, 588 (1964)). See also Offutt v. United States, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice").

The Due Process Clause of the Fourteenth Amendment serves to build up

public confidence in the fairness and integrity of the courts, by "generating the feeling, so important to a popular government, that justice has been done." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

In the present case, the conduct of the trial judge did not conform to the foregoing standard set forth by this Court. Not only did the district judge openly display his personal animosity toward the plaintiff, but "he figuratively speaking, stepped down from the bench to assume the role of advocate for the [defendants]." Knapp, 232 F.2d at 467.

The district judge sua sponte refused to ask a substantial number of voir dire questions requested by the plaintiff, thereby depriving the plain-

tiff of her right to select an impartial jury. (Transcript dated 1/7/87, pp. 2-19). The judge sua sponte dismissed plaintiff's contract and tort claims against the corporate employer. (Hearing on Motions In Limine, 1/27/87, pp. 47-50; 8T5). The judge sua sponte replaced plaintiff's proposed Special Interrogatories with his own Special Verdict, worded in a highly technical and abstract language which greatly confused the jury. (12T17, 12T28). The judge sua sponte interrupted the plaintiff's summation to the jury, and erroneously prevented her from anticipating the approved instructions. (11T84). The judge erroneously prevented the plaintiff from objecting in the presence of the jury to defense counsel egregious misstatements and flagrant improprieties in summation. (11T20-21). The judge failed to restrict defense

counsel's closing argument to its proper scope, he displayed his hostility to the plaintiff before the jury, and appeared to give his approval to the defense attorney's inflammatory and unsupported attacks on plaintiff's character, credibility and conduct of the case. (11T15, 11T22, 11T24, 11T38, 11T45, 11T47, 11T49). Finally, the judge erroneously excluded significant corroborating and impeaching evidence offered by the plaintiff, (8T8, 3T263, 3T266, 3T280, 5T142, 6T196), highly material in this case which turned essentially on the plaintiff's and the defendant's credibility.

Despite the summary affirmance of the judgment by the Court of Appeals, the record overwhelmingly demonstrates that this petitioner has not received a fair trial, and that justice has not been done in the present case.

The denial of due process and the conflict with the applicable decisions of this Court justify the grant of certiorari to review the judgment below.

CONCLUSION

The questions presented by this case are of great and recurring significance in the administration of Title VII of the Civil Rights Act of 1964 and the Due Process Clause of the United States Constitution. The serious questions of public policy involved here make this case a particularly appropriate one for the exercise of this Court's discretionary jurisdiction.

For the foregoing reasons, it is respectfully urged that this petition for a writ of certiorari should be granted.

Respectfully submitted,
MICHAELA BERESTEANU GOLIN
626 Dutch Neck Road
East Windsor, NJ 08520
Tel. Nr.: (609) 448-6592
Petitioner, pro se